12,382 customers whose change orders were rejected during the remainder of the period covered by Exhibit C-6 have likely succeeded in switching to MCI as well. 6 Tr. 371. However, notwithstanding Ms. Chapman's testimony, Exhibit C-11 indicates that MCI only made the first downward adjustment with regard to the number of lost customers (and neglected to make the second) when computing its alleged lost profits.

Third, evidence indicates that in addition to overstating the number of lost customers, Mr. Clement significantly overestimated the potential use that those customers would have made of MCI's intraLATA service had their change orders been implemented. For example, the figure he adopted to represent the average minutes of monthly use for each lost customer is nearly twice as large as the average use actually posted by MCI's existing customers. See Exhibit R-59. No reasonable justification was provided for this dramatic difference. Similarly, Mr. Clements relied on the wrong churn rate[9] when performing his analysis. As noted by Mr. Conway, the churn rate used by Mr. Clements was improper in that it combines "two subsets of customers (interLATA and intraLATA customers) who churn at different rates." 9-A Tr. 925-926. Because the actual churn rate exhibited by MCI's intraLATA customers is significantly higher than that of its interLATA customers, the blended rate used by Mr. Clements was approximately 30% too low. Id. As a result, MCI's analysis significantly overestimated the length of time that each lost customer would have continued taking intraLATA service from MCI.

Due to the number and magnitude of the deficiencies found in MCI's lost profit analysis, the Commission finds that it should adopt the ALJ's recommendation and deny MCI's request for compensatory damages.

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[9]The "churn rate" refers to the percentage of a service provider's customers that switch their service to another provider. It is generally stated on a per month basis.

Miscellaneous Requests for Relief

In addition to its request for compensatory damages, MCI sought several other forms of relief. Ameritech Michigan opposed each of those requests.

Based on his conclusion that Ameritech Michigan violated the August 1 order by refusing to implement intraLATA PIC change orders that were based on TPV or LOA and by making improper use of three-way calls, the ALJ recommended that Commission take the following seven steps: (1) Order Ameritech Michigan to cease and desist from further violations of the August 1 order. (2) Direct Ameritech Michigan to resume accepting and implementing all intraLATA PIC change orders processed through TPV or written LOA, consistent with the August 1 order and the Commission's March 10, 1995 order in Case No. U-10138. (3) Require Ameritech Michigan to immediately implement all intraLATA PIC change requests submitted by MCI on and after April 1, 1997 in which the requests were verified by either TPV or LOA. (4) Order Ameritech Michigan to cease and desist from refusing to participate in three-way calls, using three-way calls to try to persuade customers not to change service providers, using confidential customer data during three-way calls to determine or discuss with the customer the extent to which the customer uses specific services, and using three-way calls in an attempt to sell the customer additional Ameritech Michigan services or features. (5) Impose upon Ameritech Michigan a fine of $1,000 per day for every day that it has been in violation of the August 1 order. (6) Award MCI its costs and attorney fees arising from this case. (7) Require Ameritech Michigan to take appropriate steps, pursuant to Section 602 of the Act, to ensure that none of the amounts paid to MCI--or any other related defense costs incurred by Ameritech Michigan as a result of this case--are passed through to Ameritech Michigan's customers. The parties except to three of the ALJ's seven recommendations.

First, Ameritech Michigan excepts to the ALJ's proposal to require the immediate implementation of all intraLATA PIC change orders submitted by MCI since April 1, 1997 and verified through the use of TPV or LOA. Ameritech Michigan argues that the ALJ's recommendation is based on the unsubstantiated assumption that, as much as a year later, each of those customers still wants to switch intraLATA toll service to MCI. In reality, Ameritech Michigan contends, many of those customers may have already switched to some other carrier, such as AT&T or Sprint, or decided to retain Ameritech Michigan as their intraLATA service provider. Thus, it continues, what the ALJ has inadvertently proposed is that "Ameritech Michigan be ordered to slam these PIC protected customers over to MCI." Ameritech Michigan's exceptions, pp. 25-26.

Second, both MCI and Ameritech Michigan except to the ALJ's recommendation to impose a fine of $1,000 for each day that Ameritech Michigan has been in violation of the August 1 order. MCI contends that because the August 1 order had itself found Ameritech Michigan to be in violation of the Act, and because the violations at issue in the present case arise from Ameritech Michigan's failure to abide by that order, each of the present violations constitutes a "subsequent offense" under Section 601 of the Act. MCI therefore asserts that, pursuant to Section 601(a), the minimum fine that must be assessed is $2,000 per day.

In contrast, Ameritech Michigan argues that no fine is warranted in this case because any violations found in this case arose from actions taken pursuant to Ameritech Michigan's reasonable, interpretation of the August 1 order. According to Ameritech Michigan, the August 1 order specifically stated that PIC protection could be applied after the close of the six-month moratorium. "Based on that language," Ameritech Michigan contends, it can be excused for having not anticipated that "it would have to apply PIC Protection in a manner inconsistent not only with its own well-established PIC Protection procedures, but also in a manner unlike that used by any other

[local exchange carrier] in the country." Id., p. 26. Ameritech Michigan goes on to note that, because it did not intend to violate the August 1 order, the fine proposed by the ALJ would have no deterrent effect. Finally, Ameritech Michigan argues that because the ALJ's recommendation could be interpreted to mean that it must pay a $1,000 fine for each day from April 1 to December 31, 1997 (the period covered by MCI's proofs), the total fine would be over $250,000. Based on the facts of this case, Ameritech Michigan concludes, a fine of that magnitude would be penal, confiscatory, and a violation of its rights under the Act and Michigan's Constitution.

Third, Ameritech Michigan contends that the ALJ erred in recommending that the Commission award MCI its costs and attorney fees. As with the proposed fine, Ameritech Michigan contends that because any violations found in this case arose from a good faith interpretation of the August 1 order, it would be unfair to impose sanctions such as these.

The Commission finds that Ameritech Michigan's first exception is well taken. The automatic implementation of intraLATA PIC change orders submitted by MCI as long as one year ago could result in the Commission-mandated slamming of customers who (despite earlier expressing an interest in switching to MCI) are now content to take service from their existing intraLATA carriers. Therefore, the Commission concludes that this portion of the ALJ's recommended relief should be rejected.

With regard to the parties' competing exceptions concerning the ALJ's recommendation to impose a fine in the amount of $1,000 per day, the Commission finds the arguments offered by Ameritech Michigan more persuasive than those of MCI. Although the Commission has found Ameritech Michigan to be in violation of the August 1 order, it also finds the existence of mitigating circumstances. Therefore, no fine is warranted in this case.

Turning to the last of the three disputed recommendations concerning the issue of remedies, the Commission concludes that Ameritech Michigan should reimburse MCI for the reasonable expenses that it incurred in bringing this complaint, including attorney fees. This determination finds support in the September 30, 1997 order in Case No. U-11229, in which the Commission held that the City of Southfield was entitled to similar relief as a means of making the complainant whole for the economic losses it incurred in bringing a meritorious complaint against Ameritech Michigan for inadequate 9-1-1 service.[10] The Commission finds that it would be inappropriate to force MCI to bear the financial burden of litigation that became necessary to redress Ameritech Michigan's violations of the August 1 order.

Finally, with regard to the other four remedies recommended by the ALJ (namely, ordering Ameritech Michigan to cease and desist from further violations of the August 1 order, directing it to begin implementing all intraLATA PIC change orders that are verified through TPV or LOA from this day forward, ordering it to cease and desist from making improper use of three-way calls, and requiring it to take steps to ensure that none of the costs arising from the litigation of this complaint are passed through to Ameritech Michigan's customers), no exceptions have been filed. The Commission finds that these four recommendations are appropriate and should be adopted.

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[10]Further support for granting costs and attorney fees in complaint cases like this can be found in the December 17, 1997 order in Case No. U-11412 (involving Ameritech Michigan's violation of Section 305(3) of the Act through the use of its AmeriChecks promotion) and the March 24, 1998 order in Case No. U-11507 (involving Ameritech Michigan's violation of Section 308(3) of the Act due to the failure to notify the Commission of the transfer of assets to an affiliated company).

Motion to Reopen

As noted earlier, Ameritech Michigan filed a motion to reopen the record on April 9, 1998. In support of that motion, Ameritech Michigan contends that the PFD raised new issues that, if adopted by the Commission, would have unintended and harmful consequences for its existing intraLATA customers who have requested PIC protection. Specifically, it claims that the ALJ's conclusion that customers with PIC protection should be allowed to change their intraLATA carriers by using TPV or LOA (rather than relying exclusively on three-way calling) incorrectly assumes that the use of TPV will provide customers with the same degree of protection as Ameritech Michigan's PIC protection program. Ameritech Michigan asserts that in light of this unexpected and unsupported conclusion, the record should be reopened to allow it an opportunity to present evidence showing that when TPV is undertaken by or at the request of MCI, its reliability is significantly worse than that achieved by three-way calls.

In response, MCI asserts that the conclusion reached by the ALJ was not unexpected, that no reasonable excuse exists for Ameritech Michigan's failure to previously assemble and offer its purported evidence, that the schedule imposed on this case by the Act provides no feasible opportunity to introduce and examine additional evidence at this time, and that submission of the additional evidence would not change the outcome of this case. MCI therefore concludes that the motion to reopen the record should be rejected.

The Commission agrees with MCI and finds that the motion should be denied for two reasons. First, the record contradicts Ameritech Michigan's claim that the conclusion in question was unanticipated and would result in an unintended consequence. In concluding that TPV constitutes an adequate means of verifying intraLATA PIC change orders for customers with PIC protection,

the ALJ effectively adopted the second request for relief found in the complaint, which asked the Commission to:

> Direct Ameritech Michigan to accept and process intraLATA PIC change orders that have been verified through independent TPV consistent with the Commission's Opinion and Order in Case No. U-11038 and its March 10, 1995 order in Case No. U-10138.

MCI's complaint, p. 14. With that request specifically set forth in the complaint, Ameritech Michigan should have anticipated that the ALJ would address this issue in his PFD. Second, the Act requires the Commission to issue its final order in this case no later than 210 days[11] after the complaint was filed, or by May 18, 1998. MCL 484.2203(6); MSA 22.1469(203)(6). Thus, insufficient time exists to accommodate supplemental testimony and exhibits, a hearing, supplemental briefs and replies, a supplemental PFD, and supplemental exceptions and replies.

The Commission FINDS that:

a. Jurisdiction is pursuant to 1991 PA 179, as amended by 1995 PA 216, MCL 484.2101 et seq.; MSA 22.1469(101) et seq.; 1969 PA 306, as amended, MCL 24.201 et seq.; MSA 3.560(101) et seq.; and the Commission's Rules of Practice and Procedure, as amended, 1992 AACS, R 460.17101 et seq.

b. Ameritech Michigan's failure to implement intraLATA PIC change orders that are verified through TPV or LOA for customers with PIC protection violates the August 1 order.

c. Ameritech Michigan's (1) failure to participate in three-way calls, (2) use of three-way calls as an opportunity to persuade customers not to change intraLATA service providers, (3) use of

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[11]Although Section 203(6) of the Act generally provides 180 days to complete a complaint case, it allows the principal parties to extend that period by 30 days if they agree that the complexity of issues involved requires additional time. In the present case, MCI and Ameritech Michigan so stipulated on January 22, 1998. See 4 Tr. 127.

confidential customer data during three-way calls to determine or to discuss with a customer the extent to which the customer uses specific services, and (4) use of three-way calls in an attempt to sell the customer additional Ameritech Michigan services or features violates the August 1 order.

d. Ameritech Michigan should be ordered to cease and desist from further violations.

e. Ameritech Michigan should pay the reasonable expenses and attorney fees incurred by MCI to bring this complaint.

f. MCI's request for compensatory damages should be denied.

g. Ameritech Michigan's motion to reopen should be denied.

THEREFORE, IT IS ORDERED that:

A. Ameritech Michigan shall cease and desist from further violations of the Commission's August 1, 1996 order in Case No. U-11038.

B. Ameritech Michigan shall accept and implement intraLATA primary interexchange carrier change orders that are verified by independent third-party verification or through the use of written letters of authorization, consistent with the Commission's August 1, 1996 order in Case No. U-11038 and March 10, 1995 order in Case No. U-10138.

C. Ameritech Michigan shall cease and desist from (1) refusing to participate in three-way conference calls used to verify a customer's desire to change its intraLATA primary interexchange carrier, (2) using those three-way conference calls to try to persuade a customer not to change its intraLATA primary interexchange carrier, (3) using confidential customer data during three-way conference calls to determine or discuss with the customer the extent to which the customer uses specific services, and (4) attempting, in the course of three-way conference calls, to sell the customer additional services or features offered by Ameritech Michigan.

D. Ameritech Michigan shall pay the reasonable expenses, including attorney fees, incurred by MCI Telecommunications Corporation in connection with this case.

E. MCI Telecommunications Corporation's request for compensatory damages is denied.

F. Ameritech Michigan's motion to reopen is denied.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26; MSA 22.45.

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ John G. Strand
Chairman

(SEAL)

/s/ John C. Shea
Commissioner, concurring and dissenting in a separate opinion.

/s/ David A. Svanda
Commissioner

By its action of May 11, 1998.

/s/ Dorothy Wideman
Its Executive Secretary

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter of the complaint of **MCI TELECOMMUNICATIONS CORPORATION** against **AMERITECH MICHIGAN**.	)))))	Case No. U-11550

CONCURRING AND DISSENTING OPINION OF COMMISSIONER JOHN C. SHEA

(Submitted on May 11, 1998 concerning order issued on same date.)

As a result of the accompanying order, as well as the August 1, 1996 Order in Case No. U-11038 (the "August 1, 1996 Order"), which forms the basis for this proceeding, the Commission tackles two rather awkward responsibilities for which it has no evident expertise: the role of regulatory censor, deciding what communications may be made between customer and phone company, and market referee, deciding which competitive activities may be used by telecommunications companies. I envision -- with regret -- that a multiplicity of future complaint proceedings await the Commission, with the same competitors alternately appearing as complaining party as well as party complained against.

I dissented from the August 1, 1996 Order in part because I did not believe that the violation therein had been sufficiently proved. However, a majority of the Commission saw fit to issue that ruling. Thus, it is a valid order requiring obedience from those subject to its terms. The question presented by this proceeding is whether Ameritech Michigan violated a lawful Commission order and, if it did so, what penalty should be imposed. Since the August 1, 1996 Order permitted PIC change verifications other than 3-way calls, and Ameritech Michigan

refused to acknowledge such verifications, it seems beyond doubt that the order has been violated. Similarly, the August 1, 1996 Order (wrongly, in my view) forbade Ameritech Michigan from trying to persuade customers not to change service providers. While the evidence is exceedingly weak on this point, it appears from statements by representatives of Ameritech Michigan that at least some communications made by Ameritech Michigan representatives were intended to cause customers not to change service providers. Rightly or wrongly, that action violated the prohibition against: "try[ing] to persuade [a] customer not to change providers." August 1, 1996 Order at 22.

Based on the foregoing, I concur with Ordering Paragraphs A., B., C., E., and F. of the accompanying order. I dissent from Ordering Paragraph D. imposing expenses, based on the weakness of the evidence propounded on this issue, and because, as I have stated elsewhere, see, e.g., Case No. U-11412, December 19, 1997 Dissenting and Concurring Opinion, Case No. U-11178 et al., January 28, 1998 Dissenting and Concurring Opinion, the imposition of liability for expense, especially attorney fees, is a penalty that should be imposed, if at all, only rarely and after extensive fact finding.

John C. Shea, Commissioner